section 65(1) is limited by a number of exceptions set out in section 69 which expressly withhold from the Sessions Court jurisdiction in certain specified types of proceedings of a civil nature. A claim for the recovery of a debt secured by a Bill of Sale is not one of the specified exceptions.

By section 2(1)(16) of the Interpretation and General Clauses Ordinance, 1948, "Court" means any Court of the Federation of competent jurisdiction and this is the meaning which must be assigned to it wherever it appears in any written law unless there is something in the subject or context inconsistent with such construction or unless it is therein otherwise expressly provided. For the reasons which I have already expressed I cannot see that there is in the Kedah Bills of Sale Enactment anything inconsistent with the construction of the expression "the Court" in section 9 as meaning a Court of competent jurisdiction. Actions in the Sessions Court are commenced by summons under Order 6, Rule 1(1) of the Subordinate Courts Rules so that there is no procedural impediment to such a construction.

Even if a contrary construction is to be given to section 9, so that it must be held to have been the intention of the Kedah State Legislature to exclude actions on Bills of Sale from the jurisdiction of the lower Courts in the State, it would still be wrong, in my opinion, to hold that the jurisdiction of the subordinate Courts in the Federation established by the Courts Ordinance, 1948, is in any way fettered by the intention of an earlier State Enactment, unless the Federal Legislature has in terms or by necessary implication permitted the fetters to remain. A statutory provision which involves a question of jurisdiction, unless it is expressed in explicit and unequivocal terms, is not to be read in isolation, but should be considered in the light of any relevant general provisions of the interpretation and General Clauses Ordinance and of the Courts Ordinance. The present effect of section 9 can only be ascertained by a comparative study of the relevant contemporary legislation. The effect of section 2(1)(16) of the Interpretation and General Clauses Ordinance, 1948 and of section 65(1) of the Courts Ordinance, 1948 must be given due weight. Taking these provisions into consideration I am of the opinion that provided the amount secured by the Bill of Sale does not exceed $2,000 a Sessions Court is a Court of competent jurisdiction for the purpose of bringing proceedings by way of summons under section 9 of the Kedah Bills of Sale Enactment.

If the question of jurisdiction were the only ground of appeal I would allow the appeal; but the matter does not end here, since the Memorandum of Appeal to the High Court contained other grounds which the learned Judge did not consider on account of the view that he took on the question of jurisdiction. As to the course which should now be taken I agree with the learned Chief Justice that having stated our views on the question of jurisdiction we should hear argument on the outstanding grounds of appeal and that this Court should then dispose of the appeal as a whole.

Order accordingly.

Solicitors: *Lee Thean-Chu; Lee Kok Liang.*

TAN KWEE LOW v. LEE CHONG & ANOR.

[O. C. J. (Neal J.) May 7, 1960]

[Muar — Civil Suit No. 28 of 1959]

Negligence — Agency — Bailment — Negligent driving of motor vehicle — Liability of owner — Car driven by agent.

Road Traffic — Breach of Statutory Duty — Third party risks — Driving uninsured car — Owner's liability — Motor vehicles Third Party Risks Regs., reg. 3.

Where there has been a bailment, the owner of a motor vehicle is not responsible to third persons for any injury which they may sustain as a result of the negligence of the bailee in the control or management of the vehicle. But if the owner, though he places the vehicle at the disposal of someone else, retains control over it by himself or his servants, so that there is no bailment, he remains responsible to third parties for any damage caused by negligence in its management.

Whether there is a bailment or not is a question which must depend upon the particular circumstances of the case.

The plaintiff sued both the defendants claiming general and special damages in respect of an accident between a motor car owned by the first defendant and negligently driven by the second defendant and a motor cycle ridden by the plaintiff. The plaintiff's statement of claim alleged that the second defendant was the servant or agent of the first defendant.

The plaintiff sought alternatively to claim damages from the second defendant on the ground of breach of statutory duty in permitting the first defendant, an uninsured person and alleged by the plaintiff to be without means, to drive the car.

Held: (1) on the whole of the evidence, the arrangement entered into between the first and second defendants was not a bailment but was either an express agency or a placing of the car at the disposal of the second defendant. Accordingly the plaintiff is entitled to judgment as against both defendants;

(2) to succeed on the alternative claim, the plaintiff must bring himself within the case of *Monk* v. *Warbey*(10). A necessary condition for liability under *Monk* v. *Warbey* is that the person primarily responsible for the injury is in such financial position as to be unable to pay any judgment. On the evidence inability on the part of the first defendant to pay for the damages cannot be inferred and hence the plaintiff's alternative claim cannot succeed.

Cases referred to:—

(1) *Hewitt* v. *Bonvin* [1940] 1 K.B. 188.

(2) *Ormrod* v. *Crosville Motor Services, Ltd.* [1953] 2 All E.R. 753; [1953] 1 W.L.R. 1120.

(3) *Parket* v. *Miller* (1926) 42 T.L.R. 408.

(4) *Manawater County Council* v. *Rowe* [1956] N.Z.L.R. 78.
(5) *Trust Company Ltd.* v. *de Silva* [1956] 1 W.L.R. 376.
(6) *Raja Singh* v. *Chin Fatt* [1936] M.L.J. 157.
(7) *Samson* v. *Aitchison* [1912] A.C. 844.
(8) *Smith* v. *Bailey* [1891] 2 Q.B. 403.
(9) *Nicholson* v. *Harrison* (1856), 27 L.T.O.S. 56.
(10) *Monk* v. *Warbey* [1935] 1 K.B. 75.

CIVIL SUIT.

F. K. Sellar for plaintiff.

P. P. Dharmananda for 1st defendant.

S. A. Lingam for 2nd defendant.

Cur. Adv. Vult.

Neal J.: The plaintiff sued both the defendants claiming general and special damages in respect of an accident between motor car No. AA 5026 owned by the 1st defendant and driven by the 2nd defendant and a motor cycle ridden by the plaintiff. In his statement of claim the plaintiff, in addition to allegations of negligence on the part of the 2nd defendant and that such negligence was the cause of the accident and the plaintiff's injuries, alleged that the 2nd defendant was the servant or agent of the 1st defendant.

In his statement of defence the 1st defendant denied negligence and, in regard to the allegation that the 2nd defendant was his servant or agent, stated:—

"(a) admits that the defendant secondly abovenamed is attached to the Customs Department, Perak, Ipoh;
(b) denies that the defendant secondly abovenamed was at the material time his servant or agent;
(c) has no knowledge and does not admit that the defendant secondly abovenamed was at the material time in possession and/or control of motor car AA 5026 and calls for strict proof thereof."

(In view of his own evidence (c) was an obvious mistake).

In his statement of defence the 2nd defendant denied negligence, alleged that he hired the motor car from the 1st defendant, and alleged contributory negligence on the part of the plaintiff, details of which he set out.

The plaintiff in his reply, in addition to joining issue with the defendants, stated:—

3. "The plaintiff contends that the 2nd defendant was at all material times using the motor car No. AA 5026 on the road without there being in force in relation to the said user a policy of insurance or other security in respect of third party risks. The first defendant was at all material times causing or permitting such user as aforesaid contrary to Regulation 3 of the Motor Vehicles Third Party Risks Regulations.

4. "At all material times the 1st defendant was not insured against accidents and is not possessed of any means with which to pay any sum in respect of the damages claimed by the plaintiff."

At the commencement of the hearing counsel for the 1st defendant applied to have paragraph 3 of the reply deleted on the ground that it raised a fresh cause of action not pleaded in the statement of claim. As the plaintiff could have had no knowledge of the facts alleged until the statement of defence of the 1st and 2nd defendants was served upon him and the evidential presumption that the driver of a car is in default of evidence the servant or agent of the owner, I allowed the plaintiff to amend his statement of claim to add as paragraph 4(a) the allegations contained in paragraphs 3 and 4 of the reply. This then became an alternative cause of action to that alleged in the statement of claim.

On the question of whether or not the 2nd defendant's negligence had caused the accident and as to whether the plaintiff had been guilty of negligence contributing to the accident, I had little doubt on the evidence before me, but, in view of the submissions of the 2nd defendant and my knowledge of the apparent conflict in the authorities in the English Court of Appeal, I reserved my judgment. I stated at the time that I believed that some light on the English Court of Appeal decisions was likely to come out of an appeal to the Court of Appeal from a decision of mine at the previous Assizes in Muar. I refer to Muar Civil Suit No. 3 of 1958 (F.M. Civil Appeal No. 48/59). On reconsideration, however, and reading again the record of the evidence in that case it seems to me that because of the facts in that particular case a reconciliation of the English authorities is not likely to be attempted. In the previous case, namely Muar Civil Suit No. 3/58, there was clear evidence by the owner of the vehicle that a claim by the owner of a parked vehicle damaged by his car during the accident had been met by his insurance company. It is clear from the authorities that after a tort has been committed the owner of the vehicle may ratify that tort in which case his liability arises irrespective of the question of employment or agency, and I see no reason why an insured owner cannot ratify through his insurers the tort of the driver of his motor car.

There have been so many civil suits heard before me recently in which the question of the extent to which *Hewitt* v. *Bonvin*[1] (or rather the *dicta* of MacKinnon, L.J.) is to be applied when considered in relation to *Ormrod* v. *Crosville Motor Services, Ltd.*[2] and *Parker* v. *Miller*[3] that I considered it in the interests of the State that there should be either an authoritative statement of the Court of Appeal as soon as possible or consideration should be given to legislation on the lines of that in Australia, New Zealand and Canada. For these reasons I propose not to wait for the hearing of the previous appeal but to issue a judgment with the direction that it be delivered not earlier than one week preceding the 14th May, 1960, so that the parties to this case may have the advantage before the appeal period expires of any *dicta* of the Court of Appeal.

On the question of negligence I accept the evidence of the plaintiff and his pillion rider, and I reject the evidence of the 2nd defendant. I reject the evidence of the 2nd defendant except in so far as it relates to his speed, and I accept his evidence as to his speed as it is supported by (1) the evidence of the Police Superintendent called by him and (2) a note by the Investigating Officer on the investigation paper (that

having been admitted as exhibit P1, there being no objection to its admission), stating that at the time he arrived at the scene (in view of its close proximity to the police station it could not have been very long after the accident) the car driven by the 2nd defendant was still in the second gear. I reject the evidence of the 2nd defendant as to the course travelled by the motor cycle immediately preceding the collision and as to the point of the collision. I rejected it on the basis of the Investigating Officer's (PW2) evidence and on the photographs. On that evidence it seems to me that I am forced to the conclusion that the accident occurred at the spot alleged by the plaintiff and supported by the marks found on the road by the Investigating Officer. On the evidence before me I am forced to the conclusion that the cause of the accident was the negligence of the 2nd defendant in driving across the path of oncoming traffic. It was to my mind a deliberate attempt to force traffic which had the right of way to give way to him. In doing so, in the light of all the circumstances, I accepted the evidence of the plaintiff and his pillion rider as to the speed of the motor cycle. On the other hand I had little doubt that by using due care and attention which the plaintiff was bound to use he could have avoided the accident by swerving to the rear of this oncoming car. How far the failure to take this action was occasioned by failure to keep a proper look-out or determination to exercise his right of way at all costs, and how much was due to the alleged fear and being excited, is a little difficult to assess. From the fact that on his own admission he did not brake at all, I am inclined to think that a proper look-out was not being maintained by him at the time. To assess the degree of blame to be attached to each in respect of the accident is not easy, but the difficulty in the assessment does not unfortunately excuse the assessment. Bearing in mind the nature of the negligence I have found against each, I consider the proportions 70 per cent against the 2nd defendant and 30 per cent against the plaintiff to be fair.

On the question whether the 1st defendant is liable to the plaintiff for the negligence of the 2nd defendant, the position is far from clear. In support of the contention of the 1st defendant, there is the authority of dicta of MacKinnon L.J. in *Hewitt's case, supra,* and to support the plaintiff there are authorities culminating in *Ormrod's case, supra. Hewitt's case* has for years occasioned me personally some concern as to the extent to which it is authority. If it be authority, as contended in this case, for the statement that the owner of the motor car is not liable for the negligence of his driver unless it is during the course of employment, or the driver is driving the vehicle on some business in connection with which the owner has an interest, then it is clear that, carried to its logical conclusion, the judgment in *Ormrod's case* should have been the opposite to what it was, because it is clear from the facts of that case that at the time of the accident occurring through the negligence of the driver he had ceased to be driving in the interests of the owner of the motor vehicle. It is perhaps unfortunate that in *Ormrod's case* the views of their Lordships on *Hewitt's case* were not clearly stated. Again I have consulted the judgment of the New Zealand Court of Appeal in *Manawater County Council* v. *Rowe*[4] and a number of decisions of the Australian Court of Appeal ranging from 1941 to 1948 when legislation to counteract these decisions was passed. In all these cases, including *Hewitt's case,* the various Courts have been dealing with an implied agency as opposed to an express agency. In considering *Hewitt's case* one must bear in mind the facts of that case, and they are made clear by the words of Du Parcq L.J. at page 196, where, after stating that the father Mr. Bonvin was the owner of the motor car, he says:—

"I am not satisfied that Madame Bonvin even approved of the journey, much less that she regarded its performance as a duty to be delegated to her son."

Earlier his Lordship had stated that the agency had not been proved. At first it seemed to me that the two decisions of the English Court of Appeal might be reconciled on the basis that in *Hewitt's case* the Court was asked to infer agency from the facts, where as in *Ormrod's case* it was clear that there was an express agency created in favour of Murphie by the owner of the motor car, but he deviated from a direct (pursuant to the agency) course to visit friends of his own. In dealing with the liability of an owner for the negligence of a driver their Lordships in *Trust Company Ltd.* v. *de Silva*[5] use at page 378 the words "over whom he has the right to exercise control" — an apparent distinction, I think, from ability to exercise control. Whilst I still consider there may be some substance in the distinction I have not found it necessary to decide the particular point, and I raise the matter only in case it should go further in the hope that some Court with appellate jurisdiction will reconcile the two sets of authorities to which I have referred. In this connection it is not irrelevant to note that their Lordships of the Privy Council, as recently as 1956, although the opportunity was open to them since *Hewitt's case* was quoted, expressed no opinion as to the correctness of *Hewitt's case* or the extent to which it applied. I do not think it unfair to state that they have ignored *Hewitt's case* and contented themselves with the statement that liability depended on whether the *right to exercise control* had been abandoned — a somewhat different proposition to that of MacKinnon L.J. and more in accordance with the law as to bailment. I refer to the *Trust Company's case, supra.* I have considered all the decided authorities and have reached the conclusion that the following statement of the law in *Halsbury's Laws of England,* Simonds Edition, Vol. 2, at p. 145, is a correct assessment of the authorities:—

"274. **Liability of bailee and bailor to third persons.** The bailee alone is responsible to third parties for any injury which they may sustain by reason of his negligence or other wrongful act in the control or manage-

ment of the chattel, for he is not the agent of the bailor in this connexion. (*Smith* v. *Bailey*, [1891] 2 Q.B. 403, C.A.; *Gibson* v. *O'Keeney*, [1928] N.I. 66, C.A.; *Britt* v. *Calmoye and Neville*, (1928) 44 T.L.R. 294; *Hewitt* v. *Bonvin*, [1940] 1 K.B. 188, C.A.; *Cf. Wellwood* v. *King Ltd.*, [1921] 2 I.R. 274, C.A.; *Venables* v. *Smith* (1877), 2 Q.B. 279; *Smith* v. *General Motor Cab Co., Ltd.*, [1911] A.C. 188, H.L.).

"On the other hand, if the owner of a chattel, though he places it at the disposal of some one else, retains control over it by himself or his servants, so that there is no bailment, he remains responsible to third parties for any damage caused by negligence in its management. (*Reichardt* v. *Shard* (1914) 31 T.L.R. 24, C.A.; *Samson* v. *Aitchison*, [1912] A.C. 844, P.C.; *Pratt* v. *Patrick*, [1924] 1 K.B. 488; *Ormrod* v. *Crosville Motor Services, Ltd.*, [1953] 1 All E.R. 71).

"Whether there is a bailment or not is a question which must depend upon the particular circumstances of the case. (*Smith* v. *Bailey*, [1891] 2 Q.B. 403, C.A.; *Nicholson* v. *Harrison* (1856), 27 L.T.O.S. 56).

"In other respects the question of liability to third parties is determined by general principles. The bailee is liable for the acts of his servants acting within the scope of their employment, but not for their unauthorised acts when acting outside the scope of their employment."

The authority as regards placing at the disposal is obviously *Parker* v. *Miller, supra.*

I am not overlooking the decision of Aitken J. in *Raja Singh* v. *Chin Fatt*[6] at pages 158 and 159 adversely commenting on *Parker* v. *Miller*, but would content myself by saying that *Parker's case* is now accepted by leading textbook writers on the law of Torts and I think naturally follows from the part of the judgment of Williams J. in *Samson* v. *Aitcheson*[7] approved of in the Privy Council.

From this assessment of the law in a case of this nature three possibilities naturally follow, firstly, a bailment of the type commonly called in the authorities *locatio rei*, secondly, the mere placing of the motor car at the disposal of someone else, and, thirdly, agency.

Smith v. *Bailey*[8] and *Nicholson* v. *Harrison*[9] are well-established authorities establishing that to prove bailment the owner must show that the hirer or his agent had the control to the exclusion of all interference with the working or management either of the owner or his agents. I find further support for the view I have taken in the judgment of Lord Scrutton in *Cohen* v. *Sellar* referred to in the Times Law Reports, Vol. XLII, April 23, 1926, at page 409, where the following observation is reported:—

"Lord Justice Scrutton, who observed that the test of agency in cases of negligence had ever since *Quarman* v. *Burnett* (6 M. & W. 499) been, not physical control, but right to control, delivered judgment to the same effect".

Bowstead in his work on Agency, 10th Edn., at page 206, I think, reaches the same conclusion in different words. In Article 102 he summarises the position up to and including *Hewitt's case*, but not including *Ormrod's case*, in the following words:—

"Where injury or loss is caused to a third person by the wrongful act or omission of an agent who is acting within the scope of his authority, the principal is liable jointly and severally with the agent.

"An agent acts within the scope of his authority when he acts by express or implied authority of his principal or in the course of his employment as a servant.

"Where the agent is acting in the course of his employment as a servant, the principal is liable although the agent, as between himself and the principal, has no authority to do the particular act and the act is done for the benefit of the agent and not of the principal."

In Illustration 3 on page 207 the learned author has this to say:—

"As the owner of a motor car, while riding in the car with B, allows B to drive. B causes injury by negligent driving. Unless it can be shown that A has abandoned control, he is liable for the injury".

With that statement of the law, after considering all the authorities, I am in complete agreement and with respect adopt it. However the learned author then proceeds:—

"The question in such cases, is whether, according to the permission given and the circumstances of the case, the driver is driving, on his own behalf, a car which is bailed to him, or is driving, on behalf of the owner, or under delegation of the task of driving".

If this is to be interpreted as meaning that the sole questions for decision are as quoted, then, with respect, I am unable to accept it as a correct statement of the law, for it leaves at large a driver driving on his own behalf a car placed at his disposal but not the subject of a bailment.

The following footnote at page 730, in *Beven's* work on Negligence (4th Edn.) gives some little support to the view I have reached:—

"Anyone owning or having possession of a motor-car, unless he has by contract or otherwise divested himself of the duty of control, is civilly liable for the negligence of any person whom he allows to drive". (*Samson* v. *Aitchison* [1912] A.C. 844; *Reichardt* v. *Shard* (1914), 31 T.L.R. 24, C.A.; *Pratt* v. *Patrick* [1924] 1 K.B. 488, C.A.; *Elliott* v. *Beattie* [1926] S.L.T. 588; *Parker* v. *Miller* (1926), 42 T.L.R. 408; *Chandler* v. *Broughton* (1832), 2 L.J. Ex. (N.S.) 25..

The difficulty of reconciling the authorities in these cases has drawn the comments of a number of textbook writers in their attempts to reconcile. *Fleming* in his Law of Torts, 1st Edn., at page 377, endeavours to reconcile *Ormrod's case* with *Hewitt's case* on the basis that *Ormrod's case* was a claim for property damaged which was not covered under compulsory third-party insurance as opposed to damage to the person. I am unable to accept this attempted reconciliation as, to the best of my knowledge, the law is the same whether a person or property be injured. I have considered the comments by *Winfield* in his book on the Law of Tort, third Edn., at pages 119 and 120, and find some little support for the view I have taken in adopting the words of the Editors of *Halsbury's Laws of England.*

In considering *Hewitt's case* I noted that my difficulties in this and other cases arise out of generalisations by MacKinnon L.J. which do not appear to have been expressly approved by Du Parcq L.J. In fact there appears to be every support, after a perusal of both judgments, for the statement that those generalisations were not supported by Du Parcq L.J. Unfortunately, Bennett J.'s judgment does not give us any assistance, although the quotation by MacKinnon

L.J. of remarks made by Bennett J. during hearing, but not reported in his judgment, would suggest Bennett J.'s support for the generalisations of MacKinnon L.J. MacKinnon L.J. at page 191 says:—

"If in this case the plaintiff is to make Bonvin the father liable for the damages he claims he must establish that the son was driving the car as the servant of his father, and in the course of his employment".

And again at page 192:—

"But before any question as to the right of control and direction over the tortfeasor arises at all, it must be established that in doing the act complained of he was employed by the third party to do work for him".

As a statement of the law I am unable to accept these two statements and I prefer the statement in *Halsbury* to which I have referred. Du Parcq L.J., however, at pages 194, 195 and 196, in my opinion, correctly states the position, but he proceeds to hold at page 196 that the Judge in the Court below had held on the facts that the son was driving the car with the knowledge of his mother who had authority to represent the appellant and the mother knew (but did not necessarily approve of) the purpose for which the car was being used — facts which clearly placed that case outside the three alternative elements of liability enunciated by *Halsbury*.

To summarise, the submission made on behalf of the 1st defendant does not in my opinion gain any support from the judgment of Du Parcq L.J. but only from the judgment of MacKinnon L.J. the expression of whose opinion I am forced, after consideration of the authorities, to doubt. Support for the view I have taken, and possibly for the contention that *Hewitt's case* applies only to the case of an implied agency, is to be found in the following words of Du Parcq L.J. at page 194:—

"and proof of agency is all that is required in order that the judgment which the respondent has secured may be retained. The driver of a car may not be the owner's servant, and the owner will be nevertheless liable for his negligent driving if it be proved that at the material time he had authority, express or implied, to drive on the owner's behalf".

I would emphasise "owner's behalf" not business. Owner's business may be one of tests but not the only one.

I have considered the whole of the evidence before me and, bearing in mind the question of onus of proof, I have come to the conclusion that the arrangement between the 1st defendant and the witness Ng Yook Ping (DW2) and the 2nd defendant was not a bailment for the following reasons:—

(1) If the arrangement between DW2 and the 1st defendant was bailment, then there would have been no need to get the consent or approval for the 2nd defendant taking the car. The bailment to DW2 would enable him to lend the car to the 2nd defendant without consent. The fact that such consent was necessary is, to my mind, clear evidence that there was no intention on the part of the 1st defendant to abandon his right to control the car, but rather the intention to maintain the right to control.

(2) The pointing out by the 1st defendant to DW2 and by DW2 to the 2nd defendant of the whereabouts of the certificate required under the compulsory third party insurance regulations, as to the indemnity to an owner in respect of an accident, could have no possible application to bailment as understood generally, but could be accounted for only if the relationship was either (a) of agency, or (b) as stated in *Halsbury* "placing at the disposal".

(3) At the end of his evidence I asked the 1st defendant the following question:—

Q. "Were you not giving that third person authority to drive your car for 10 days?"

A. "That is so".

(4) On the 25th May, 1959, the plaintiff's solicitors accused the 1st defendant of being either the principal or the master of the driver of the car, and wanted to know whether he admitted liability. His reply was a request to them to contact the Insurance Company and discuss the question with them. I do not consider this in itself important, but taken in connection with these other matters it seems to me to exclude any question of bailment, because if there was bailment the insurance policy did not cover the accident.

(5) Pleading (c) to which I have drawn attention.

Finally on this particular aspect I would refer to the reply made by the 1st defendant to the last question put to him in cross-examination. Unfortunately I did not take a note of the actual question, but my recollection is clear that it was put to him that he knew that for 10 days the car would be in the care and control of this third person. His answer was "Yes." That is not, in my opinion, sufficient on the authorities as I appreciate them. It is bailment only if exclusive control and the right to control had been abandoned. It is not sufficient to give anything less than an exclusive control — a control to the exclusion of the owner's control.

For these reasons I am of the opinion that the arrangement entered into was not a bailment of this motor car as understood in law, but was either an express agency or a placing of the car at the disposal of the 2nd defendant. It is at least the latter, and probably the correct inference to be drawn on the facts is that it was an express agency.

In case I have read too much into the quotation from *Halsbury, supra,* to which I have referred and which is based on the decision of the Court of Appeal in *Parker's case, supra,* (where owner got out of car and left another to drive), I think I should express my opinion as to whether the evidence establishes agency. After considerable thought I have reached the conclusion (although not without some doubt) that the evidence does just succeed in establishing agency. The evidence concerned is that on which I relied for the finding that the arrangement was not a bailment in accordance with the established principles.

The question in my opinion has to be determined as at the point of time when the car was handed to DW2 for handing over to the 2nd defendant, and here I think the handing over of the insurance certificate to DW2 to be handed to the 2nd defendant or to have the 2nd defendant's attention drawn to its existence has to be considered. Regulation 3(1) of the Motor Vehicles Third Party Risks Regulations (L.N. 452 of 30th March, 1946) states:—

"Subject to the provisions of these Regulations it shall not be lawful for any person to use or to cause or permit any other person to use a motor vehicle unless there is in force in relation to the user of the motor vehicle by that person or that other person as the case may be such a policy of insurance or such a security in respect of third-party risks as complies with the requirements of these Regulations."

This in my opinion has created a duty on the owner of a motor car, the breach of which is punishable, not to permit another person to drive his car unless covered by insurance. The evidence before me shows that the policy would cover the 2nd defendant if an agent but not if a bailee. Counsel for the plaintiff pressed the 1st defendant in cross-examination as to the covering of the 2nd defendant and the intention to have him covered by insurance. Unfortunately I did not record the actual questions but my memory is clear as to the line of cross-examination, and the 1st defendant said:—

"I had never met this person before I lent car. When I gave car to Ng the certificate of insurance was in car; I to'd him it was in car. I did not realise when I gave car to Ng for purpose of lending to another that the question of insurance was important. I knew he was lending car to another and I gave it to him for that purpose. I knew name of third person not in insurance. I now say that when I pointed policy out in car I realised the importance of insurance when 3rd party driving".

Are not the actions of the 1st defendant and his agent DW2 the equivalent of saying to the 2nd defendant and in fact to the public that "The certificate is the badge of your authority to drive the car on my behalf"? I think if it stood alone it would be. But unfortunately there are two other provisions of the Regulations which must be considered, namely, Reg. 10(1) which reads:—

"Any person against whom a claim is made in respect of any such liability as is required to be covered by a policy under subparagraph (h) of paragraph (1) of Regulation 4 shall on demand by or on behalf of the person making the claim state whether or not he was insured in respect of that liability by any policy having effect for the purposes of these Regulations or would have been so insured if the insurer had not avoided or cancelled the policy and if he was or would have been so insured give such particulars with respect to that policy as were specified in the certificate of insurance delivered in respect thereof under paragraph (3) of Regulation 4."

(If the certificate had been handed over for this purpose then it would support agency because it is being produced to show insurance cover in respect of the driver). And Reg. 15(1) which reads:—

"Any person when in charge of a motor vehicle on a road shall on being so required by a police officer in uniform or a road transport officer authorised in writing by the Commissioner in that behalf (who shall on being so required, produce such authorisation) give his name and address and the name and address of the owner of the motor vehicle and produce the certificate of insurance in respect of the motor vehicle and if he fails to do so he shall be guilty of an offence against these Regulations".

(The effect of this Regulation is to some extent offset the proviso permitting production in 5 days, but its existence does detract to some extent from the effect of this piece of evidence). But read in conjunction with the other evidence I am of the opinion that it does to some extent support agency.

During the course of the hearing an unreported decision of Good J. in Ipoh Civil Suit No. 140/57 was referred to and in particular to the statement at page 4 where his Lordship said:—

"I am further of the opinion that Lee Bak Ho (the driver of the 1st defenfant's car in that suit) cannot be deemed to have been the agent of the first defendant on that occasion. I base my opinion on the case of *Hewitt* v. *Bonvin, supra*, from which it is clear that the fact that the driver was driving the car with the consent of the owner does not make him the agent of the owner, unless he is driving on the owner's business".

It would seem from this quotation that his Lordship was referring to what I have described as implied agency as opposed to express agency. Again, on a full consideration of Hewitt's case I am of the opinion that his Lordship, in referring to the question of consent of the owner, was carrying that case further than the point that was actually decided. If one accepts the proposition that a case is no more authority than the point it decided, *Hewitt's case* does not support any proposition beyond the one that a father whose car is taken by a son with the knowledge of the mother to take the son's friend home is not liable for the son's negligence. Anything beyond that is obiter, i.e. father's consent to borrow gun and car to go shooting.

I am of the opinion therefore that the plaintiff is entitled to judgment as against both defendants.

In case I should hereafter be found to be wrong in my application of the legal principles involved, I proceed to state my views on the alternative claim of the plaintiff. To succeed he must bring himself within the case of *Monk* v. *Warbey*[10]. Although counsel for the plaintiff showed considerable courage in putting the 2nd defendant into the witness box as his witness, it is a pity that he did not obtain a clear answer from the 2nd defendant as to whether he was able to meet a judgment of, say, $2,000 or more. The evidence shows that the 2nd defendant was an out-door revenue officer in the government and, owing to tuberculosis, he has been on sick leave since the date of the accident, that he was married and had a number of children to support. In his final submission counsel for the plaintiff stated that these facts were sufficient to draw the inference that the 2nd defendant would be unable to meet a judgment if it were given, a necessary condition for liability under *Monk* v. *Warbey, supra.* Although this may come very close to the circumstances where the Court

would feel justified in drawing such an inference, I regret that the absence of any evidence as to other assets prevents my assuming as against the 2nd defendant inability to pay any judgment. For that reason, and that reason only, the claim on the alternative ground by the plaintiff must in my opinion fail.

As regards damages, the plaintiff has proved that for the period from 23rd April, 1958, to 31st August, 1958, a total of 129 days, he was unable to work as a rubber tapper. On the evidence I think it not unreasonable to fix his daily income at $4 per day. I see no reason why I should not accept the evidence regarding excessive tapping of the rubber trees. I have worked this period strictly in accordance with the medical evidence. There is, however, in addition clear evidence that the plaintiff actually did very little work for the next 78 days. He says that he tried but found himself unable to work. The medical evidence on the other hand is clear that medically there was nothing to stop him from working. It has however been accepted both medically and legally that litigation neurasthenia does in fact exist. There are many instances when in claims of this nature and workers compensation an allowance is made in respect thereof. I think it not unreasonable therefore to allow a further 20 days which should adequately cover this aspect. Under this heading the damage will be for 149 days at $4 per day, making $596.

As regards the claim for loss of earnings in respect of cooking, the evidence before me shows that the cooking ceased on or about the 31st July, 1958. The plaintiff is entitled under this heading to 3 months and 8 days at $112 per month, amounting to $366.

Under the next heading "Nourishment expenses whilst in hospital" the plaintiff claims $260 for 130 days at $2 per day. On the evidence before me I consider this claim unreasonable. However, considering the need for some extra nourishment in addition to the hospital diet, I think it not unreasonable to allow $100 under this heading.

As regards the claim for members of the plaintiff's family visiting the hospital, there is no evidence before me that the plaintiff actually reimbursed the members of his family, or alternatively that this was an expenditure that he had to meet, although in fact it may well be so. I do not think that there is sufficient evidence to warrant my drawing any inference that he must have met this expense for the members of his family. If there had been such evidence, then I would have, following the trend of recent English decisions, allowed something for, say, two or three visits per week.

Under the heading of special damages therefore I allow $1,062.

As regards general damages, there is the fact that the plaintiff suffered two major injuries, fracture of the left clavicle and fracture of the left tibia, with bruises and abrasions on many parts of the body. He was in hospital from the 23rd April to the 7th June, 1958, and was an out-patient up to the 23rd June, 1958. It seems to me not unreasonable to assess his damages for pain and suffering and loss of the usual amenities while he was in the hospital at $1,000. In addition he would have a permanent shortening of his leg about three-quarters of an inch. Although the Medical Officer expressed the view that the plaintiff's earning power would be decreased by 5 per cent, the facts of the case before me established no such less of earning power, but, even though he manages to earn the same money, it will not be so easy and he must suffer some discomfort in his work and his future enjoyment in life. I consider that a sum of $2,000 would adequately compensate the plaintiff for any future disability.

I therefore award special damage of $1,062 and General damage of $3,000, making a total of $4,062.

I have already assessed the degree of responsibility for the accident at 70 per cent against the 2nd defendant and 30 per cent against the plaintiff. Accordingly there will be judgment against both defendants in the sum of $2,843.40. The plaintiff is also entitled to costs against both defendants as taxed by the Assistant Registrar, Supreme Court, Muar.

Order accordingly.

Solicitors: *Sault, Keith Sellar & Co.; Cheang Lee & Ong; S. A. Lingam.*

PUBLIC PROSECUTOR v. CHOO TECK HENG

[A. Cr. J. (Ambrose J.) July 7, 1960]

[Singapore — Magistrate's Appeal No. 85A of 1960]

Road Traffic — Inconsiderate driving — Road Traffic Ordinance (Cap. 227), s.25(1) — Major road — Proof — Judicial notice — Right of way under Rule 12(1) of the Road Traffic Rules, 1950 — Failure to observe Highway Code — Charge — Wording of.

This was an appeal by the Public Prosecutor against an acquittal. The accused, a taxi-driver, was charged with inconsiderate driving under section 25(1) of the Road Traffic Ordinance (Cap. 227). It was alleged that he failed to give right of way at a certain junction to traffic proceeding on a main road and thereby collided with two motor cars. He was acquitted without being called upon to enter upon his defence.

The Magistrate refused to take judicial notice that Mountbatten Road is a major road.

In the Magistrate's view, the driver of the motor car proceeding along Mountbatten Road had himself contravened rule 12(1) of the Road Traffic Rules, 1950, by not giving way at an uncontrolled intersection to the accused's taxi, which was approaching his front from his right or off side.

Held: (1) there was sufficient evidence to establish that Mountbatten Road is a major road: in any event, the fact that Mountbatten Road is a major road was too notorious to require proof;

(2) the right of way under rule 12(1) of the Road Traffic Rules, 1950, was not absolute, but had to be exercised subject to the statutory duty to drive with reasonable consideration for other road users;

(3) failure to observe rule 23 of the Highway Code may be relied upon as tending to establish lack of reasonable consideration for other road users.